105

No. _____

(1)

Supreme Court, U.S.
FILED

08-371

SEP 18 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

LINDA K. HADLEY,

Petitioner,

v.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION (HGEA), AFSCME, LOCAL 152, AFL-CIO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

R. STEVEN GESHELL
6600 Kalanianaole Hwy., Ste. 116
Honolulu, HI 96825
(808) 396.7701

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTIONS PRESENTED

1. Whether the courts below deprived Petitioner of her constitutional rights to access the federal courts, due process, and equal protection guaranteed by the First and Fourteenth Amendments to the United States Constitution by dismissing her *Vaca vs. Sipes*, 386 U. S. 171 (1967), hybrid claim against Respondent Union for breach of its duty of fair representation.

2. Whether the petition for *certiorari* should be granted to resolve the conflict between the Third and Ninth Circuit Court decisions on whether the federal district court has subject-matter jurisdiction over the public employee's claim against the public union for breach of its duty of fair representation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

REASON FOR ALLOWANCE OF THE WRIT 7

ARGUMENTS 10

CONCLUSION 26

APPENDICES

United States Court of Appeals for the Ninth Circuit Memorandum, filed June 2, 2008 .....App. 1-3

Order Granting Motion to Dismiss in the District Court for the District of Hawaii, filed March 13, 2006.....App. 4-15

Judgment in a Civil Case, filed March 14, 2006 .....App. 16-17

Order Denying Petition for Rehearing *En Banc*, filed July 10, 2008 .....App. 18

TABLE OF AUTHORITIES

Page

CASES

American Federation of State, County and Municipal Employees, AFL-CIO vs. Woodward, 406 F.2d 137 (8th Cir. 1969).....18

Ayres vs. International Brotherhood of Electrical Workers, 666 F.2d 441 (9th Cir. 1982) .....*passim*

Bolling vs. Sharpe, 347 U. S. 497, 74 S.Ct. 693 (1954).....20

Bowen vs. United States Postal Service, 459 U. S. 212, 103 S.Ct. 588 (1983).....15

California Motor Transport Co. vs. Trucking Unlimited, 404 U. S. 508, 92 S.Ct. 609 (1972).....17, 23, 24

Cooper vs. Fitzharris, 586 F.2d 1325 (9th Cir. 1978).....23

Del Costello vs. International Brotherhood of Teamsters, et al., 462 U. S. 151 (1983) .....*passim*

Farber vs. City of Paterson, 440 F.3d 131 (3d Cir. 2006).....9, 10, 15, 19, 26

Frontiero vs. Richardson, 411 U. S. 677, 93 S.Ct. 1764 (1973).....21

Hudson vs. Palmer, 468 U. S. 517 (1984).....23

In re Herrick and Irish, 82 Haw. 329, 922 P.2d 942 (1996).....20

In re Lum Yip Kee, 32 Haw. 385 (1932) 19

In re Smythe, 592 N.W.2d 628 (Wis. 1999) 19

TABLE OF AUTHORITIES – Continued

Page

Jimenez vs. Weinberger, 417 U. S. 628, 94 S.Ct. 2496 (1974) 21

Johnson vs. Avery, 393 U. S. 483 (1969) 23

Kahawaiolaa vs. Norton, 386 F.3d 1271 (9th Cir. 2004) 25

Lewis vs. Casey, 518 U. S. 343, 116 S.Ct. 2174 (1966) 17

Long vs. District Court of Iowa, Lee County, Iowa, 385 U. S. 192, 87 S.Ct. 362 (1966) 17

Martin vs. New York State Department of Correctional Services, et al., 224 F.Supp.2d 434 (N.D.N.Y. 2002) 16

Poe vs. HLRB, 105 Haw. 97 (2004) 24, 25

Professional Association of College Educators, TSTA/NEA vs. El Paso County Community College District, 730 F.2d 258 (5th Cir. 1984) 18

Radtke vs. American Federation of State, County and Municipal Employees, 376 F.Supp.2d 893 (E.D.Wis. 2005) 16

Schlesinger vs. Ballard, 419 U. S. 498, 95 S.Ct. 572 (1975) 21

Schneider vs. Rusk, 377 U. S. 163, 84 S.Ct. 1187 (1964) 20

State vs. Mallan, 86 Haw. 440, 950 P.2d 178 (1998) 19

Steele vs. Louisville & N. R. Co., 323 U. S. 192, 65 S.Ct. 226 (1944) 14

TABLE OF AUTHORITIES – Continued

Page

Troyer vs. Adams, 102 Haw. 399, 77 P.3d 83 (2003) 19

U. S. vs. Gilley, 836 F.2d 1206 (9th Cir. 1988) 23

Vaca vs. Sipes, 386 U. S. 171 (1967) ..... *passim*

Weber vs. Department of Veterans Affairs, 521 F.3d 1061 (9th Cir. 2008) 23

Weinberger vs. Wiesenfeld, 420 U. S. 636, 95 S.Ct. 1225 (1975) 21

West vs. Conrail, 481 U. S. 35 (1987) 10, 11, 12, 13

Wilbur vs. Locke, 423 F.3d 1101 (9th Cir. 2005) 23

Williams vs. United Airlines, Inc., 500 F.3d 1019 (9th Cir. 2007) 23, 24

Young vs. United States Postal Service, 907 F.2d 305 (2d Cir. 1990) 16

STATUTES

Hawaii Revised Statutes

Section 89-8(a) 2, 15, 19, 22

UNITED STATES CODE

Title 15, Section 151 ..... 13, 14

Title 28, Section 1254(1) 1

Title 28, Section 1291 7

Title 28, Section 1331 ..... 3, 7

Title 29, Section 142(3) 12

TABLE OF AUTHORITIES – Continued

Page

Title 29, Section 152(2) 11
Title 29, Section 152(3) 11, 13, 23
Title 29, Section 185 ..... 3, 7, 16, 20
Title 29, Section 187 7
Title 29, Section 187(b) 4, 16
Title 29, Section 412 ..... 4, 7, 12
Title 42, Section 1981 17

CONSTITUTIONAL PROVISIONS

United States Constitution

First Amendment ..... *passim*
Fourth Amendment 23
Fifth Amendment 2, 12, 19, 20, 21
Fourteenth Amendment 18, 21

Rules and Regulations

United States Supreme Court Rules

Rule 10 26

OPINIONS BELOW

The Ninth Circuit Court of Appeals issued the initial opinion on June 2, 2008 in its unpublished Memorandum Decision. **(Appendix 1-3)**. The Ninth Circuit affirmed the March 13, 2006 decision of the United States District Court for the District of Hawaii dismissing the Petitioner's Complaint for lack of subject matter jurisdiction **(Appendix 4-15)** and the March 14, 2006, Judgment in the United States District for the District Court for the District of Hawaii dismissing Petitioner's Complaint. **(Appendix 16-17)**. On July 10, 2008, the Ninth Circuit Court filed the Order Denying the Petition for Rehearing En Banc. **(Appendix 18)**.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals Judgment Affirming the U. S. District Court for the District of Hawaii was filed June 2, 2008 **(Appendix 1-3)**. The Petition for Rehearing *En Banc* was filed June 12, 2008. The Ninth Circuit Court of Appeals Order Denying the Petition for Rehearing *En Banc* was filed July 10, 2008 **(Appendix 18)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person . . . shall . . . be deprived of life, liberty or property, without due process or law, nor shall private property be taken for public use, without just compensation."

Hawaii Revised Statutes (HRS) § 89-8(a) provides, in pertinent part:

> "(a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership . . . "

28 U.S.C. § 1331 provides, in pertinent part:

"**Federal question**. The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

29 U.S.C. § 185 provides, in pertinent part:

"**Suits by and against labor organizations.**

(a) Venue, amount, and citizenship.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

(c) Jurisdiction.

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

29 U.S.C. § 187(b) provides:

"Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of § 185 of this title without respect to the amount of controversy, or in any other court having jurisdiction of the party, and shall recover the damages by him sustained and the costs of the suit."

29 U.S.C. § 412 provides:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

STATEMENT OF THE CASE

Petitioner is a registered professional nurse in the State of Hawaii and was a full-time permanent, registered professional nurse at the Hawaii Youth Correctional Facility (HYCF) since October of 2001. Respondent is her union, representing the Hawaii

Government Employees under a collective bargaining agreement (CBA). This is a hybrid action against the union per *Vaca vs. Sipes*, 386 U. S. 171 (1967), and was commenced within six months of the award denying her just compensation in violation of the CBA. The Respondent (hereafter, "Union"), egregiously violated its duty of fair representation by deliberately refusing to enforce the CBA by failing to call Petitioner's expert witnesses to prove that she was entitled to extra pay at the HYCF. She started this lawsuit in federal court within six months of the award denying her such compensation, per *Del Costello vs. International Brotherhood of Teamsters, et al.*, 462 U. S. 151 (1983). When Petitioner was hired by the State, she was informed that the Youth Facility was a 24-hour, seven-day-a-week operation, even though the medical unit was not open 24 hours a day. To accomplish that, she was given a pager and a cell phone to enable her to be on call for service to the facility, as she was the only full-time medical personnel at the HYCF and was solely responsible for all the medical services and decisions there on a 24-hour, seven-days-a-week basis for the youth adjudicated to that facility. The Union told her that she was entitled to stand-by pay for being on call 24 hours per day, seven days a week. Eventually the Union took the case to arbitration about two years after she first contacted her union, seeking extra pay. Petitioner asked the union attorney to call Dr. Bidwell as a witness to prove the need for her to be on call 24 hours a day. Dr. Bidwell would have confirmed that she was entitled to back- and front-pay for stand-by

pay, as she was the principal medical personnel at HYCF. Dr. Bidwell was a physician hired on contract with the State and was not available 24 hours a day, seven days a week. Petitioner also asked the union attorney to call two other witnesses to support her position, but the union attorney refused to do so. Moreover, at the arbitration hearing, the employer's witness committed perjury about Dr. Bidwell being on call rather than Petitioner, so if Dr. Bidwell had testified, he would have denied such fact and supported Petitioner. The Complaint alleged the Union breached its duty of fair representation, as follows:

> (1) failing to properly represent Petitioner and calling her necessary witnesses at the arbitration;
>
> (2) advising her that she should not go to arbitration and that she would get nothing there;
>
> (3) advising her that she should use the chain of command to get better results than arbitration;
>
> (4) falsely advising her she had been offered $24,000 to settle and another $24,000 in compensation;
>
> (5) filing the arbitration in an untimely manner;
>
> (6) failing to call Dr. Bidwell and other witnesses at the arbitration; and
>
> (7) failing to impeach the State's chief witness by using the testimony of Dr. Bidwell

and his documentation to prove that she was, in fact, on call, and Dr. Bidwell was not.

Petitioner sought loss of income damages of $40,000, general damages for emotional distress, and punitive damages, plus medical expenses and attorney's fees.

The basis of federal jurisdiction in the district court was based on *Vaca vs. Sipes*, 386 U. S. 171 (1967); 28 U.S.C. § 1331; 29 U.S.C. §§ 185, 187, & 412. The Court of Appeals had jurisdiction of her appeal under 28 U.S.C. § 1291.

REASONS FOR ALLOWANCE OF THE WRIT

For the first time in 1967, this Court decided that employees have a cause of action against their union for breach of duty of fair representation, which claim may be brought in either federal or state court. This appears to be the first case that brings before this Court the issue of whether *Vaca vs. Sipes* also accorded that same remedy in federal and state courts to public employees whose union breaches its duty of fair representation by deliberately refusing to enforce the CBA by egregious conduct which harms the employee. In the 41 years that followed *Vaca*, public unions have escaped responsibility for their actions, making, in effect, public employees second-class citizens because they could not access the federal and state courts using *Vaca vs. Sipes* as a theory of recovery and jurisdictional basis. Now is the time for this

Court to accept *certiorari* and correct this gross injustice to public employees. There is absolutely no reason why public employees and public unions should be treated differently than the private-sector employees and union. This country is founded upon the principles of equal justice for all, but the Ninth Circuit and trial court decisions have deprived Petitioner of her constitutional rights to access courts, to associate in the union to due process and equal protection of the laws. Thus, it is time to correct this total injustice and grant public employees the same rights that private-sector employees have to pursue their judicial remedies in federal court against their union for breach of duty of fair representation under *Vaca vs. Sipes*.

In the 41 years that have elapsed since *Vaca*, undoubtedly the volume of the number of public employees has increased dramatically. Therefore, it is time to recognize that public employees have the same right to access federal and state courts to pursue their hybrid action against their union for breach of duty of fair representation. *Vaca* should not be restricted to simply private-sector employees. There is no valid reason for such distinction to make public employees inferior to those in the private sector. This amounts to an invidious discrimination based upon the nature of the employer. Governmental employees are, without a doubt, entitled to the same constitutional rights and same remedies that private-sector employees are in the eyes of the law. Now is the time

to correct this gross injustice by granting *certiorari* to correct such injustice.

In addition to the important question of federal law that has not been but should be settled by this Court, Petitioner asserts that there is a conflict in the decisions of the Third and the Ninth Circuit Courts of Appeal on the issue of whether the district court has jurisdiction over the breach of duty of fair representation claim by a public union employee against the union. The Third Circuit recently held, in *Farber vs. City of Paterson*, 440 F.3d 131, 143-145, (3d Cir. 2006), whereas *Ayres vs. International Brotherhood of Electrical Workers*, 666 F.2d 441 (9th Cir. 1982), held to the contrary that political entities such as the State and their political subdivisions are not employers and, therefore, the public employees' tort claim for breach of duty of fair representation may not be brought in federal court as the district court lacks subject-matter jurisdiction. Accordingly, since there is a serious conflict on this important federal question which should be settled by this Court, granting *certiorari* is the appropriate remedy.

ARGUMENTS

A. The district court had subject matter jurisdiction of the hybrid claim against the Union and the State because *Ayres* needs to be overruled and *Vaca* and *Farber* applied.

With all due respect to the district court in applying and the Ninth Circuit Court deciding *Ayres vs. International Brotherhood of Electrical Workers*, 666 F.2d 441 (9th Cir. 1982), it is respectfully submitted that such application of the hybrid action recognized in *Vaca vs. Sipes*, *supra*, and *Del Costello*, *supra*, is broader than applied by those courts in this case. Clearly, *Vaca vs. Sipes* set new precedent for authorizing suits in federal and state court by employees whose union breached its duty of fair representation (DFR) in representing the employee under a collective bargaining agreement (CBA). Although those cases involved non-public employees against non-public employers, the legal principles announced and applied in those two cases are clearly broader than simply reading the statutory definitions to determine whether employees may pursue their legal remedies under *Vaca vs. Sipes* and *Del Costello* in federal court. This conclusion is supported by the 1987 case of *West vs. Conrail*, 481 U. S. 35 (1987). The *West* case was decided April 6, 1987. *Ayres* was decided January 28, 1982. In *West*, the railroad employee sued his employer for breach of CBA and against his union for breach of its duty of fair representation. The district court granted summary judgment for the defendants,

and the employee appealed. The Third Circuit affirmed, but this Court, applying *Del Costello*, held:

> "Although we have not expressly so held before we now hold that when the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been 'commenced' in compliance with rule 3 within the borrowed period." 481 U. S. at 39, 107 S.Ct. at 1541.

It is important to note that, under the *definitions* section in the Labor Management Relations Act, 29 U.S.C. § 152(3), *employee* excludes, in pertinent part, "any individual employed by an employer subject to the Railway Labor Act as amended from time to time or by any other person who is not an employer as herein defined."

Here, and in *Ayres*, contrary to the reasoning of *West*, the employee was determined to fall outside the definition of an employee, and the state was not an employer under the definitions contained in 29 U.S.C. § 152(2). Therefore, the trial and appellate courts erroneously determined that the trial court lacked jurisdiction to decide this hybrid action against the public employees' Union. Certainly, if there were a jurisdictional issue that prevented the district court, the Third Circuit, and the U. S. Supreme Court from deciding *West vs. Conrail*, it would have been raised and considered at each level. This Court saw no

jurisdictional impediment to deciding the case in *West*. Therefore, Petitioner argues that, under the facts of this case where Petitioner is a public employee suing her public Employer and her Union for breach of duty of fair representation, she is entitled to pursue such remedies in U. S. District Court for the District of Hawaii. The breach of duty of fair representation is based on a fiduciary relationship between the union and the employee and is not solely grounded on a statutory definition. *Vaca* and *Del Costello*. As argued later, to apply *Vaca* and *Del Costello* to exclude public employees from their legal and equitable remedies in federal court, is too restrictive and violates their constitutional rights guaranteed under the First and the Fifth Amendments to the United States Constitution. Such conclusion is further reinforced by 29 U.S.C. § 412 which provides:

> "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

29 U.S.C. § 142(3) provides: "The terms 'commerce,' 'labor disputes,' 'employer,' 'employee,' 'labor

organization,' 'representative,' 'person,' and 'supervisor' shall have the same meaning as when used in subchapter II of this chapter."

The definitions found in subchapter II of the National Labor Relations Act. 29 U.S.C. § 152(3), defines *employee* in pertinent part, as follows:

> "(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined."

As is readily seen, this *employee* definition purports to exclude individuals employed by employers subject to the Railway Labor Act, 15 U.S.C. § 151, but this Court, in *West vs. Conrail*, had no jurisdictional

difficulty applying *Vaca vs. Sipes* and *Del Costello* to the hybrid action by the railroad employee against his employer and union. The same reasoning applies here to cause this Court to overrule *Ayres vs. IBEW*, *supra*. The district court clearly had subject matter jurisdiction over this hybrid action against the Union for breach of its fiduciary duty of fair representation and against the Employer under the CBA.

In the predecessor to *Vaca*, *Steele vs. Louisville & N. R. Co.*, 323 U. S. 192, 65 S.Ct. 226 (1944), decided that a labor union owes a judicially created duty to represent the members under the Railway Labor Act, and said, in pertinent part, at 323 U. S. 202, 65 S.Ct. 232:

> "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates * * * We hold that the language of the Act to which we have referred read in the light of the purposes of the Act expresses the aim of Congress to impose on the bargaining representative of a craft * 203 or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

In *Farber vs. City of Paterson*, 440 F.3d 131 (3d Cir. 2006), the Court held, *inter alia*, the city employee may properly sue the union in federal court for a *Vaca* breach of duty of fair representation claim even though the state statute required unfair labor practices be brought before the state labor relations commission. This conflicts with *Ayres*, *supra*, creating the conflict between the Ninth and Third Circuits. Hawaii's statute, HRS § 89-8(a), as in *Farber*, grants to the public union the exclusive right to represent the interests of public employees. Therefore, as in *Farber*, the union has a corresponding duty of fair representation per *Vaca*, *supra*. *Farber* further held, in pertinent part, at p. 143, that even though the New Jersey statute granted exclusive power to the Public Employment Relations Commission of New Jersey to hear unfair practice claims that would not preempt Farber's breach of duty of fair representation claim at law in federal court. The *Farber* reasoning was that, as in *Vaca*, even though the unfair labor practice claims were ordinarily heard by the NLRB, *Vaca* decided that such provision would not prevent the employee from suing her union for breach of duty of fair representation implied in § 9(a) of the National Labor Relations Act. The same reasoning and decision applies here.

Postal workers were entitled to sue the union and the employer, United States Postal Service, in federal court under *Vaca* claims without any jurisdictional problem in the cases of *Bowen vs. United States Postal Service*, 459 U. S. 212, 103 S.Ct. 588 (1983);

and *Young vs. United States Postal Service*, 907 F.2d 305 (2d Cir. 1990).

Two district courts have found no jurisdictional impediment to a union employee working for a political subdivision of a state to pursue their hybrid actions in federal court. *Radtke vs. American Federation of State, County and Municipal Employees*, 376 F.Supp.2d 893 (E.D.Wis. 2005); and *Martin vs. New York State Department of Correctional Services, et al.*, 224 F.Supp.2d 434 (N.D.N.Y. 2002).

The Ninth Circuit and the district court committed reversible error in refusing to apply 29 U.S.C. § 187(b) which makes it clear that:

> "Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of § 185 of this title without respect to the amount of controversy, or in any other court having jurisdiction of the party, and shall recover the damages by him sustained and the costs of the suit."

That statute was another basis for district court jurisdiction.

B. Dismissal of the hybrid action for lack of subject matter jurisdiction deprives the Plaintiff of her constitutional rights to access the federal courts, due process, and equal protection.

(1) Plaintiff's First Amendment right to access courts was denied.

Clearly, the First Amendment to the United States Constitution prohibits Congress from passing any law abridging the right of the people "to petition the Government for redress of grievances." There is no dispute that the right to access courts and to petition the Government for redress of grievances is a fundamental right, protected by the First Amendment to the United States Constitution. *California Motor Transport Co. vs. Trucking Unlimited*, 404 U. S. 508, 510, 92 S.Ct. 609, 612 (1972). The right to access courts is a fundamental constitutional right. *Lewis vs. Casey*, 518 U. S. 343, 346, 116 S.Ct. 2174, 2177 (1966). The right to sue implicates the equal protection provisions of our constitutions. *Long vs. District Court of Iowa, Lee County, Iowa*, 385 U. S. 192, 194, 87 S.Ct. 362, 364 (1966).

It is also clear that 42 U.S.C. § 1981 protects the right of all persons in the United States to enforce contracts and to sue and further protects the rights of all persons in the United States "against impairment by nongovermental discrimination and impairment under color of state law." It needs no citation of legal authority to state the well-recognized proposition of law that the First Amendment rights are

incorporated in the Fourteenth Amendment Due Process Clause of the U. S. Constitution.

American Federation of State, County and Municipal Employees, AFL-CIO vs. Woodward, 406 F.2d 137, 139 (8th Cir. 1969), recognized that "Union membership is protected by the right of association under the First and the Fourteenth Amendments. *Thomas vs. Collins*, 323 U. S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945); *McLaughlin vs. Tilendis*, 398 F.2d 287 (7th Cir. 1968)." The First Amendment right to join and participate in a union flows not only to unions but to the members and organizers of that union, including the right of public employees to join unions and the right of their unions to engage in advocacy and petitioning the government on their behalf. *Professional Association of College Educators, TSTA/NEA vs. El Paso County Community College District*, 730 F.2d 258, 262 (5th Cir. 1984).

Here, by application of *Ayres*, *supra*, the district court and the circuit court concluded that the federal court system is not available to public employees in hybrid actions for breach of duty of fair representation and breach of the CBA. Clearly, all employees should have the right to access courts and not just restricted to employees of non-public employers. There is no sound reason for public policy or application of the First Amendment that should preclude public employees from suing their union and employer in federal court, whereas private employees in the private sector have rights to do so in federal court under *Vaca* since 1967. This is an invidious

discrimination and deprivation of the right to access courts for employees of the state and political subdivisions and against their own public union. Petitioner had no control over her union's conduct (HRS § 89-8(a)). Her remedy is best using *Vaca* in federal court because the State court is a co-employee of the State. Under those circumstances, the employee's best forum is **federal court** under ***Vaca***, *supra*; and ***Farber***, *supra*.

(2) Plaintiff's Fifth Amendment right to due process and equal protection were denied.

Certainly, no reasonable person would quarrel with the concept that not only our legislature but our trial and appellate courts are required to accord litigants due process of law and equal protection of the laws. *In re Lum Yip Kee*, 32 Haw. 385 (1932); *In re Smythe*, 592 N.W.2d 628, 632 (Wis. 1999). The Hawaii Supreme Court has recognized that due process contains both procedural and substantive components. *State vs. Mallan*, 86 Haw. 440, 950 P.2d 178 (1998). Where a fundamental right is implicated, judicial action is subject to the strict-scrutiny standard but where a fundamental right is not implicated, the governmental action is subject only to the rational-basis test. *Mallan*, 86 Haw. at 451, 950 P.2d at 189. We also know from *Troyer vs. Adams*, 102 Haw. 399, 433-434, 77 P.3d 83, 117-118 (2003), that

> "due process is not a fixed concept requiring a specific procedural course in every situation

> (citation omitted). Rather, due process is flexible and calls for such procedural protections as the particular situation demand (citation omitted). The basic elements of procedural due process require notice and an opportunity to be heard at a meaningful time and in a meaningful manner."

A substantive challenge to state action is either that the state action is facially or as applied, invalid under the Due Process Clauses of the Constitution. *In re Herrick and Irish*, 82 Haw. 329, 345, 922 P.2d 942, 958 (1996).

By following the *Ayres* construction of 29 U.S.C. § 185, the Court prevented public employees from using *Vaca* as a remedy available to the private sector employees. This clearly violates due process and equal protection based upon the following authorities and, while not directly in point on the issue of whether preventing public-sector employees from suing their union and public employer in federal court, they stand for the proposition that due process and equal protection were violated under the Fifth Amendment to the United States Constitution:

> (a) *Bolling vs. Sharpe*, 347 U. S. 497, 74 S.Ct. 693 (1954) [Racial segregation in public education violated Fifth Amendment due process because equal protection and due process are fundamental rights of fairness which are not mutually exclusive.]
>
> (b) *Schneider vs. Rusk*, 377 U. S. 163, 84 S.Ct. 1187 (1964) [Denationalization statute

concerning naturalized citizens residing continuously for three years in their birth country violated due process because it discriminates unconstitutionally against naturalized citizens.]

(c) *Jimenez vs. Weinberger*, 417 U. S. 628, 94 S.Ct. 2496 (1974) [Federal welfare law violated equal protection and due process guaranteed by the Fifth Amendment to the United States Constitution].

(d) *Frontiero vs. Richardson*, 411 U. S. 677, 93 S.Ct. 1764 (1973) [Federal statute concerning the right of female members of the uniformed services to claim her spouse as a dependent violated the due process clause of the Fifth Amendment under the strict-judicial-scrutiny standard].

(e) *Schlesinger vs. Ballard*, 419 U. S. 498, 95 S.Ct. 572 (1975) [Although Fifth Amendment does not contain an equal protection clause as does the Fourteenth Amendment, the Fifth Amendment Due Process Clause prohibits the federal government from discrimination which unjustifiably violates due process].

(f) *Weinberger vs. Wiesenfeld*, 420 U. S. 636, 95 S.Ct. 1225 (1975) [Federal social security statute violated equal protection under the Due Process Clause of the Fifth Amendment, prohibiting gender-based discrimination].

Under the plain-error standard of review, Petitioner has been clearly prejudiced by being effectively

excluded from federal court jurisdiction on her hybrid claim against her Union in violation of the foregoing constitutional amendments.

It is, therefore, argued that the district and circuit court decisions applying *Ayres* result in an invidious discrimination against public employees. This case appears to be the first case raising the constitutional issues that such application of *Vaca* and *Del Costello* hybrid claims by public employees against their union and public employer violates due process and equal protection by denying them access to federal courts. Excluding public employees from federal court jurisdiction and construing the federal statutes as doing so makes public employees second-class citizens. The Union has the exclusive right to represent the employee's interest against the employer (HRS § 89-8(a)). The public employee should correspondingly have the *Vaca* DFR remedy in federal and State court. If she cannot pursue her hybrid action in federal court, this puts the employee in state court where the judges are employed by their common employer. Surely, that prejudices Petitioner's ability to redress the wrong asserted here. If public employees have no hybrid claim in federal court, yet union employees in private enterprise have such a claim, this places public employees in a clearly inferior and prejudicial position under employment law. Such result denies public employees due process and equal protection by violating their First Amendment right to access courts. Therefore, Plaintiff requests that this Court overrule *Ayers*, as it is unconstitutional on

its face and as applied to public union employees seeking relief against their union and their employer.

C. The Ninth Circuit Decision is Flawed on Constitutional Issues.

The Ninth Circuit relied on *Weber vs. Department of Veterans Affairs*, 521 F.3d 1061, 1063-1064 (9th Cir. 2008), claiming that Hadley's constitutional challenges to LMRA were not preserved, and in doing so overlooked *Cooper vs. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978); and *U. S. vs. Gilley*, 836 F.2d 1206, 1212 (9th Cir. 1988), under the plain-error doctrine. Here, Hadley is arguing that the District Court, not the statute, deprived her of constitutional right to due process, equal protection, and accessing courts. The panel did not reach that issue in its decision on constitutional grounds. Instead, the panel cited *Wilbur vs. Locke*, 423 F.3d 1101, 1116 (9th Cir. 2005); and *Williams vs. United Airlines, Inc.*, 500 F.3d 1019, 1022 (9th Cir. 2007), claiming that accessing courts is not an absolute right but is limited by the statutory grant of jurisdiction. *Wilbur* cited *Hudson vs. Palmer*, 468 U. S. 517, 523 (1984); and *California Motor Transport Co. vs. Trucking Unlimited*, 404 U. S. 508, 515 (1972). *Hudson* reasoned that persons should have reasonable right to access courts under *Johnson vs. Avery*, 393 U. S. 483 (1969). The *Hudson* case even recognized that prisoners in confinement are entitled to enjoy due process protection but not Fourth Amendment protection against searches. *Johnson vs. Avery* reversed a rule prohibiting one prisoner from

helping another to petition the court for *habeas corpus*. *California Motor* held, *inter alia*, that the right to access courts is within prescribed procedure but that First Amendment rights cannot be used for achieving "substantive evils." 404 U. S. at 515. Here, the substantive evil to exclude the public employees from using *Vaca* and *Del Costello* in federal court is that it makes second-class citizens out of public employees, whereas private employees can access the federal courts for their hybrid claims against their union.

In the *Williams* case, the issue was whether the Airline Whistleblower Protection Program authorized the employee to bring suit in federal court for violations of the Whistleblower Protection Program. The Court held that it did not because the District Court lacked subject-matter jurisdiction. This reasoning does not apply to the case at bar because *Vaca* judicially created the right of action against the union and the employer to redress the wrong by the union in federal court. Therefore, where the private employee has such right, it deprives a public employee of equal protection and due process rights to access the Court to hold that public employees have no federal claim under *Vaca*. *Vaca* was not a statutory construction case but a judicially created right of action.

The Ninth Circuit decision cited *Poe vs. HLRB*, 105 Haw. 97, 102 (2004), for the proposition that Hadley could have brought her claim in state court. This is an incorrect reading of *Poe* which applied *Vaca*, where the employee filed prohibited-practice

complaints with the Hawaii Labor Relations Board, lost, and appealed that to the State circuit court. *Poe* used *Vaca* to hold, *inter alia*, that a wrongfully discharged employee may bring an action against the employer provided the employee can prove the union breached its duty of fair representation. There, the Court also held in footnote 2 (105 Haw. at 103) that the employee had exhausted his administrative remedies and so need not further pursue grievances with the union. However, *Poe* failed to establish that he was prevented from exhausting his contractual remedies so did not prove his union breached its duty of fair representation so Poe lacked standing to pursue his claim before the HLRB. Those facts and legal reasoning are not applicable here on the constitutional arguments made in this case of first impression.

Lastly, the circuit court cited *Kahawaiolaa vs. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004), as requiring Hadley to "negative every conceivable basis which might support [the rationality of the statutory classification]." Here, the District Court opinion, not the statute, was the invidious discrimination based upon preventing public employees from using *Vaca* as a remedy in federal court where private employees can do so. Therefore, the *Norton* case is not applicable here.

D. *Certiorari* must be granted to resolve the conflict between two Circuit Court decisions on the same important issue of federal court jurisdiction of the duty of fair representation claim.

As previously noted, the case of *Farber vs. City of Paterson*, *supra*, and *Ayres vs. International Brotherhood of Electrical Workers*, *supra*, conflict on the issue of whether the federal district court has jurisdiction over the public employee's claim against the public union for breach of duty of fair representation. Therefore, under Rule 10 of the U. S. Supreme Court Rules, this Court should grant *certiorari* to decide this important issue of federal jurisdiction over the *Vaca vs. Sipes* claim by public employees against their public union.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

R. STEVEN GESHELL
6600 Kalanianaole Hwy., Ste. 116
Honolulu, HI 96825
(808) 396.7701
Attorney for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LINDA K. HADLEY, Plaintiff-Appellant, v. HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, AFSCME LOCAL 152, AFL-CIO; Defendants-Appellees.	No. 06-15642 D.C. No. CV-05-00660-ACK MEMORANDUM* (Filed Jun. 2, 2008)

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted March 13, 2008
San Francisco, California

Before: RYMER, RAWLINSON, and CALLAHAN, Circuit Judges.

Appellant Linda K. Hadley (Hadley) appeals the district court's dismissal of her hybrid action against the Hawaii Government Employees' Association and the State of Hawaii, Department of Human Services, for lack of subject-matter jurisdiction.

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

The outcome of this appeal is controlled by *Ayres v. International Brotherhood of Electrical Workers,* 666 F.2d 441 (9th Cir. 1982). Because Hadley's employer is a political subdivision of the state of Hawaii for purposes of the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 152, 185; Haw. Rev. Stat. § 26-4 (establishing the Department of Human Services); *NLRB v. Natural Gas Util. Dist. of Hawkins County, Tennessee,* 402 U.S. 600, 604-05 (1971) (defining political subdivisions), the district court lacked subject-matter jurisdiction over Hadley's hybrid action. *See Ayres,* 666 F.2d at 444.

Because the district court lacked original subject-matter jurisdiction over Hadley's hybrid action, no basis existed for the exercise of supplemental jurisdiction over her state law claim. *See Herman Family Revocable Trust v. Teddy Bear,* 254 F.3d 802, 805 (9th Cir. 2001). Nor was the district court authorized to transfer the claim to the state courts of Hawaii under 28 U.S.C. § 1631, which provides for the transfer of actions only between federal courts. *See* 28 U.S.C. § 610.

Hadley's constitutional challenges to the LMRA were not preserved. *See Weber v. Dept. of Veterans Affairs,* 521 F.3d 1061, 1063-64 (9th Cir. 2008), *as amended.* In any event, her challenges are not meritorious. "[T]he right of access to the courts is not absolute." *Wilbur v. Locke,* 423 F.3d 1101, 1116 (9th Cir. 2005) (citation omitted). "Jurisdiction of the lower federal courts is . . . limited to those subjects encompassed within a statutory grant of jurisdiction."

Williams v. United Airlines, Inc., 500 F.3d 1019, 1022 (9th Cir. 2007) (citation omitted). Moreover, because Hadley could have brought her claim in state court, *see Poe v. Hawaii Labor Relations Bd.*, 105 Haw. 97, 102 (2004), she has not been denied access to the courts. Hadley cannot prevail on her substantive due process or equal protection claims because she has failed to "negative every conceivable basis which might support [the rationality of the statutory classification]." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004) (citation omitted).

Finally, because Hadley has not prevailed on appeal, her request for attorney's fees on appeal is denied. *See Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Indus., Inc.*, 84 F.3d 1186, 1192 (9th Cir. 1996).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

LINDA K. HADLEY, Plaintiff, v. HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; STATE OF HAWAII, DEPARTMENT OF HUMAN SERVICES, Defendants.	) Civ. No.) 05-00660 ACK/KSC

ORDER GRANTING MOTION TO DISMISS

(Filed Mar. 13, 2006)

BACKGROUND

Linda K. Hadley ("Plaintiff") filed a Complaint against Hawaii Government Employees' Association, AFSCME, Local 152, AFL-CIO (the "Union") and the Department of Human Services of the State of Hawaii ("State Defendant"), alleging two causes of action: (1) a "hybrid action" against the Union and State Defendant for violation of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §§ 158 and 185, and (2) State Defendant's violation of the Hawaii Whistleblowers' Protection Act, H.R.S. § 378-61, *et seq.* *See* Complaint at 2, 8-9.

On November 18, 2005, State Defendant filed a Motion to Dismiss Complaint ("Motion to Dismiss"). On December 13, 2005, the Union filed a Substantive Joinder in the Motion to Dismiss ("Joinder"). On February 20, 2006, Plaintiff filed an Opposition to the Motion to Dismiss and Joinder. On February 28, 2006, State Defendant filed a Reply. A hearing was held on March 13, 2006.

STANDARD

A court's subject matter jurisdiction may be challenged under Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)"). "A party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction." *See Thompson v. McCombe,* 99 F.3d 352, 353 (9th Cir. 1996).

On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court is not "restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States,* 850 F.2d 558, 560 (9th Cir. 1988). "Once the moving party [converts] the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction."

Savage v. Glendale Union High Sch., 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

"The requirement that the nonmoving party present evidence outside his pleadings in opposition to a motion to dismiss for lack of subject matter jurisdiction is the same as that required under Rule 56(e) that the nonmoving party to a motion for summary judgment must set forth specific facts, beyond his pleadings, to show that a genuine issue of material fact exists." *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987). Thus, the moving party "should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Casumpang v. Int'l Longshoremen's & Warehousemen's Union*, 269 F.3d 1042, 1060-61 (9th Cir. 2001).

DISCUSSION

I. Hybrid Action Claim

Count 1 of the Complaint alleges a "hybrid action against both the employer [State Defendant] and the Union under 29 U.S.C. §§ 158 and 185 per *Vaca v. Sipes*, 386 U.S. 171 ([ ] 1967)." *See* Complaint at 2; *see also id.* at 8. In *DelCostello v. Int'l Brotherhood of Teamsters*, the U.S. Supreme Court explained the nature of such a hybrid action brought pursuant to *Vaca*: "when the union representing the employee [against the employer] in the grievance/arbitration procedure acts in such a discriminatory, dishonest,

arbitrary, or perfunctory fashion as to breach its duty of fair representation . . . an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." *See DelCostello v. Int'l Brotherhood of Teamsters,* 462 U.S. 151, 164 (1983); *see also Vaca v. Sipes,* 386 U.S. 171 (1967).

The resulting hybrid action claim comprises two causes of action. *DelCostello,* 462 U.S. at 164. "The suit against the employer rests on § 301 [of the Labor Management Relations Act, 29 U.S.C. § 185], since the employee is alleging a breach of the collective bargaining agreement." *Id.* "The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act." *Id.* To prevail against either the employer or the Union, the employee-plaintiff must not only show that his "discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union." *Id.,* 462 U.S. at 165. The suit can therefore be described as a hybrid Section 301/fair representation claim, amounting to a direct challenge to the private settlement of disputes under the collective bargaining agreement. *Id.*

A. Federal Jurisdiction over Hybrid Actions in General

Vaca was an appeal from the Supreme Court of Missouri, in which the U.S. Supreme Court specifically

determined that "Missouri courts had jurisdiction in [that] case" to hear the hybrid action. *See Vaca,* 386 U.S. 171, 188 (1967). Courts have interpreted *Vaca* and its progeny to stand for the proposition that LMRA Section 301, 29 U.S.C. § 1985, provides federal jurisdiction for hybrid actions asserting Section 301/fair representation claims. *See Tamburello v. Comm-Tract Corp.,* 67 F.3d 973, 979 (1st Cir. 1995) (plaintiff "brought his fair representation allegations as part of a 'hybrid' action under § 301, which provides federal jurisdiction for employees to sue their employer for breach of a collective bargaining agreement, and their union for breach of its duty of fair representation"); *Coleman v. General Mills,* 1994 WL 696116 (6th Cir. 1994) (claim "may be construed as a 'hybrid' action filed against the company and against the union under § 301 of the LMRA, over which the federal courts have proper jurisdiction"); *Talbot v. Robert Matthews Distributing Co.,* 961 F.2d 654, 663 (7th Cir. 1992) ("Section 301 provides federal jurisdiction for employees to sue their employer for breach of a collective bargaining agreement and their union for breach of its duty of fair representation"); *Cannon v. Kroger Co.,* 837 F.2d 660, 661 (4th Cir. 1988) ("a typical hybrid action under § 301 of the Labor Management Relations Act . . . , although federal in nature, may be commenced and prosecuted in either federal district court or in state court"). For this reason, to the extent that State Defendant may be arguing that there is no federal jurisdiction under Section 301 for hybrid claims against employers in general, such an argument fails. *See* 29 U.S.C. § 185.

B. Jurisdiction over the Hybrid Action Claim Against State Defendant under the LMRA

LMRA Section 301(a), 29 U.S.C. § 185(a), provides federal district courts with jurisdiction for suits alleging "violation of contracts between an employer and a labor organization." State Defendant argues that it is not an "employer" within the meaning of the LMRA. *See* Motion to Dismiss at 3-4.

The LMRA excludes states and their political subdivisions from its definition of "employer." 29 U.S.C. § 152(2) provides:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

The general definition section for the LMRA, at 29 U.S.C. § 142(3), provides that the terms "employer," "employee," and "labor organization," (among others) shall have the same definitions when used elsewhere in the LMRA as those terms are given in

29 U.S.C. § 152, which is quoted above.[1] *See* 29 U.S.C. §§ 142, 152; *see also Ayres v. Int'l Brotherhood of Electrical Workers,* 666 F.2d 441, 442-444 (9th Cir. 1982) (analyzing the relationship between the subchapters of the LMRA and determining that the definition of "employer" contained at 29 U.S.C. § 152(2) applies to the term as it is used in 29 U.S.C. § 185(a)).

Thus, 29 U.S.C. § 185(a) does not grant this Court jurisdiction over claims against an individual employed by a political subdivision of the State of Hawaii. *See* 29 U.S.C. §§ 142, 152; *Ayres,* 666 F.2d at 444 ("section 301(a) of the Act, 29 U.S.C. § 185(a), does not grant this court jurisdiction over the claims of an individual employed by a political subdivision of a state"). The fact that Plaintiff brings the action against its employer under 29 U.S.C. § 185 as part of a hybrid action does not somehow create jurisdiction in this Court. *See, e.g., Ayres,* 666 F.2d 441 (dismissing hybrid action against employer and union for lack of jurisdiction where employer was political subdivision of the state); *Jacobs v. Ohio Valley Regional Transportation Authority,* 636 F.Supp. 841 (N.D. W. Va. 1986) (same). Plaintiff has cited no cases finding

---

[1] 29 U.S.C. § 142 states in part: "When used in this chapter – The terms 'commerce', 'labor disputes', 'employer', 'employee', 'labor organization', 'representative', 'person', and 'supervisor' shall have the same meaning as when used in subchapter II of this chapter." *See* 29 U.S.C. § 142(3). The definitions for subchapter II are contained in 29 U.S.C. § 152. *See* 29 U.S.C. § 152.

jurisdiction over a state employer under the LMRA, in a hybrid case or otherwise.[2]

State Defendant, the Department of Human Services of the State of Hawaii, is a political subdivision of the State of Hawaii. *See* H.R.S. § 26(4) (establishing the Department of Human Services); *see also N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee,* 402 U.S. 600, 604-605 (1971) (noting that the term "political subdivision" in 29 U.S.C. § 152(2) is not defined by the statute, but that Congress intended the political subdivision exception to exempt state employees since they did not usually enjoy the right to strike; approving the NLRB's two-prong test for "political subdivision" to include "entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate"); *Museum Associates v. N.L.R.B.,* 688 F.2d 1278, 1280 (9th Cir. 1982) (recognizing NLRB's two-prong construction of "political subdivision" as it is used in 29 U.S.C. § 152(2)). Accordingly, Section 301, 29 U.S.C. § 185, does not provide this Court with jurisdiction over Plaintiff's hybrid action claim against State Defendant.

---

[2] *Vaca* does not address the issue of whether federal jurisdiction exists where the employer is a state or political subdivision thereof because *Vaca* did not involve a state employer. *See Vaca,* 386 U.S. 171, 173 (plaintiff sued union but not employer; employer was a private company).

Nor does this Court have jurisdiction over Plaintiff's hybrid action claim against State Defendant pursuant to 29 U.S.C. §§ 158 or 187. First, 29 U.S.C. § 158 itself does not contain any grant of federal jurisdiction. *See* 29 U.S.C. § 158 (describing unfair labor practices). Second, the grant of federal jurisdiction contained in 29 U.S.C. § 187 is "subject to the limitations and provisions of section 185." *See* 29 U.S.C. § 187(b). The limitations and provisions of 29 U.S.C. § 185, as discussed, except from jurisdiction in this Court claims against employers who are political subdivisions of a state. *See* 29 U.S.C. §§ 142, 152, 185.

For these reasons, the Court lacks jurisdiction over Plaintiff's hybrid action claim against State Defendant.

C. Jurisdiction over the Hybrid Action Claim Against the Union under the LMRA

The Union argues that the Court lacks jurisdiction over the hybrid action claim against it because, just as State Defendant is not an "employer" under the LMRA, the Union argues that it is not a "labor organization" and Plaintiff is not an "employee." *See* Joinder at 2. The Court agrees for the same reasons as discussed with respect to State Defendant.

The definitions of "employer," "employee," and "labor organization" contained in 29 U.S.C. § 152 apply to 29 U.S.C. § 185. *See* 29 U.S.C. §§ 142, 152, 185; *Ayres,* 666 F.2d at 442-444. "Employee" does "not

include . . . any individual employed . . . by any . . . person who is not an employer as herein defined." *See* 29 U.S.C. § 152(3). "Employer" does "not include . . . any State or political subdivision thereof." *See* 29 U.S.C. § 152(2). "Labor organization" is defined (in part) as "any organization . . . in which *employees* participate and which exists for the purpose . . . of dealing with *employers* concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." *See* 29 U.S.C. § 152(5) (emphasis added). Thus, "[b]y the plain, unambiguous language of the LMRA, the definition of 'labor organization' excludes an organization of employees of a political subdivision of a state." *See Pacific Maritime Ass'n v. Local 63, Int'l Longshoremen's and Warehousemen's Union,* 198 F.3d 1078, 1081 (9th Cir. 1999).

Since Plaintiff is not an "employee," State Defendant is not an "employer," and the Union is not a "labor organization" under the LMRA, 29 U.S.C. § 185 does not give this Court jurisdiction over the hybrid action claim against the Union. *See Ayres,* 666 F.2d at 444 (in a hybrid action against employer and union, holding that "section 301(a) of the Act, 29 U.S.C. § 185(a), does not grant this court jurisdiction over the claims of an individual employed by a political subdivision of a state"); *Jacobs,* 636 F.Supp. at 843 (in hybrid action against the employer and union where employer is a political subdivision of the state, holding that 29 U.S.C. § 185(a) does not provide federal jurisdiction). Nor do 29 U.S.C. §§ 158 or 187 give this Court jurisdiction over the hybrid action

claim against the Union, for the same reasons as discussed with respect to State Defendants. *See, supra,* § IB; *see also Pacific Maritime Ass'n,* 198 F.3d at 1083 (analyzing effect of LMRA definitions on 29 U.S.C. §§ 158 and 187 and finding no federal district court jurisdiction for claim under 29 U.S.C. § 187 against labor organization of public sector employees).

For these reasons, the Court lacks jurisdiction over Plaintiff's hybrid action claim against the Union.

II. Whistleblower Claim against State Defendant

In addition to the hybrid action claim alleged against both defendants, the Complaint alleges that State Defendant "violated the Hawaii Whistleblowers' Protection Act contained in H.R.S. § 378-61, *et seq.*" *See* Complaint at 9. Plaintiff alleges that the Court has jurisdiction over this claim pursuant to its supplemental jurisdiction under 28 U.S.C. § 1367. *See* Opposition at 6. However, because the Court has found that it does not have jurisdiction over the hybrid action claim, there are no "claims in [this] action within [the Court's] original jurisdiction." *See* 28 U.S.C. § 1367(a); *see also Kelly v. Fleetwood Enterprises, Inc.,* 377 F.3d 1034, 1040 (9th Cir. 2004). Therefore, the Court lacks subject matter jurisdiction over the whistleblower claim. *See Kelly,* 377 F.3d at 1040 (finding no supplemental jurisdiction over state

law claim where underlying claims were dismissed for lack of jurisdiction); *see also United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

Accordingly, the whistleblower claim is dismissed for lack of jurisdiction.[3] Plaintiff may pursue adjudication of that claim in state court.

CONCLUSION

The Court grants the Motion to Dismiss. The Complaint is dismissed without prejudice in its entirety for lack of subject matter jurisdiction.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 13, 2006.

/s/ Alan C. Kay
Alan C. Kay
Sr. United States
District Judge

[SEAL]

[3] The Court declines to reach the issue of sovereign immunity since it finds that it lacks subject matter jurisdiction over Plaintiff's claims. *See* Motion to Dismiss at 7-8 (arguing that State Defendant is immune from suit in federal court for "any state claims" contained in the Complaint, pursuant to the Eleventh Amendment to the U.S. Constitution).

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

LINDA K. HADLEY

Plaintiff(s),

V.

HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; STATE OF HAWAII, DEPT. OF HUMAN SERVICES

Defendant(s).

JUDGMENT IN A CIVIL CASE

Case: CV 05-00660 ACK-KSC

(Filed Mar. 14, 2006)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Complaint is dismissed without prejudice in its entirety for lack of subject matter jurisdiction, pursuant to the "Order Granting Motion to Dismiss", filed March 13, 2006.

cc: all counsel

March 14, 2006
Date

/s/ SUE BEITIA
Clerk

/s/ [Illegible]
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDA K. HADLEY, Plaintiff-Appellant, v. HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, AFSCME LOCAL 152 AFL-CIO, Defendant-Appellee.	No. 06-15642 D.C. No. CV-05-00660-ACK District of Hawaii, Honolulu ORDER (Filed Jul. 10, 2008)

Before: RYMER, RAWLINSON, and CALLAHAN, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The Petition for Rehearing En Banc filed on June 12, 2008, is DENIED.